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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 3

ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION,

Appellants,

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR APPELLANTS IN NO. 3, ORGANIZED VILLAGE OF KAKE, AND ANGOON COMMUNITY ASSOCIATION

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Opinions Below

The opinion of the court below rendered June 2, 1961, is reported in 362 P. 2d 901, and printed as an Appendix to the Statement as to Jurisdiction filed herein. The opinion of this Court based on a previous appeal from the judgment of the District Court for the District of Alaska in Juneau acting as a transitional state court, directing appellants to proceed with their appeal to the Supreme Court of Alaska for clarification of certain issues, is reported in 363 U. S. 555. The opinion of Mr. Justice Brennan, as Circuit Justice,

upon a temporary restraining order pending the previous appeal, is reported in 80 S. Ct. 33 and 4 L. ed. 2d 34. The opinion of Kelly, J. of the District Court for the District of Alaska appears in the printed record (R. 58-66) and is reported in 174 F. Supp. 500. Supplemental findings of fact appear at pp. 67-69 of the printed record.[1]

Jurisdiction

Jurisdiction of this Court is invoked under § 1257 of the Judicial Code, sub pars. (1), (2). The Supreme Court of the State of Alaska handed down its opinion on June 2, 1961 (Appendix to Statement as to Jurisdiction),[2] affirming the judgment of the District Court for the District of Alaska pursuant to which the complaints of these appellants in No. 3 were to be dismissed. R. 58-66. Written notice of appeal was filed by these appellants July 26, 1961. Statement as to Jurisdiction was filed September 25, 1961. Appellee waived its right to file a motion to dismiss or affirm, and by order of October 23, 1961, this Court noted probable jurisdiction.

The issues in this case were first brought to the attention of this Court by an earlier appeal of appellants herein from the decision of the District Court for the District of Alaska which was then the highest court of the State of Alaska in which a decision could be had. 363 U. S. p. 560. Pending this earlier appeal appellants sought and obtained on July 11, 1959, through Mr. Justice Brennan, acting as Circuit

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[1] The printed record consists of the Transcript of Record (R.), and Supplemental Transcript of Record (S.R.) in Dockets 326-327, O.T. 1959 (now Dockets 2 and 3, O.T. 1961), which served the Supreme Court of Alaska as the record in this case and has been designated as the major part of the record on appeal. The parties have been excused by this Court from printing the balance of the record on appeal, which consists mainly of the opinion of the Supreme Court of Alaska.

[2] Hereinafter designated "Opinion".

Justice, a stay of execution. Thereafter this Court in its opinion of June 20, 1960, stated that "the appeals are within our jurisdiction under 28 U. S. C. § 1257(2), since the court below sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution." 363 U. S. at p. 557.[3] Appeals had been taken from the decision of the District Court to the newly organized Supreme Court of the State of Alaska; and this Court directed that the appeals be prosecuted to obtain from that (the new Supreme) court enlightenment on "antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State." 363 U. S. p. 561. The Court continued the stay of execution pending final determination of the issues.

Now that the Supreme Court of Alaska has had an opportunity to pass upon the issues and interpret local laws, this Court has before it the appeal from the decision of the Supreme Court of Alaska as well as the appeal from the decision of the transitional District Court for determination on the merits.

Constitutional Provisions, Treaties, Statutes, etc.

The following are quoted in our earlier red Appendix:

Treaty with Russia, Mar. 30, 1867, 15 Stat. 539, 542, Art III.—red App. 1-2.

R. S. § 1839, from Revised Statutes, Provisions Common to All the Territories, 1874.—red App. 2.

Alaska Civil Government Act of May 17, 1884, 23 Stat. 24, 26, § 8, proviso.—red App. 2-3.

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[3] At p. 557 of the decision, this statement was made conditional upon the District Court's having been "the highest court of a State in which a decision could be had" at the time of the appeal. At p. 560 of the decision, the Court stated that this condition had been met.

Alaska Statehood Act of July 7, 1958, 72 Stat. 339, Pub. L. 85-508, §§ 1, 4, 6(e), 7, 8(a), (b), (c) and (d), 12, 13, 14, 15, 16, 17, 18.—red App. 4-14.

Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, Pub. L. 86-70, § 2(a), (b).—red. App. 14-15.

White Act of June 6, 1924, 43 Stat. 464, as amended, from 48 U. S. C. §§ 221, 222, 226, 227, 228.—red App. 15-17.

Constitution of Alaska as ratified by electorate of Alaska April 24, 1956, and effective under the Statehood Act on January 3, 1959: Art. IV, Secs. 1, 2, 3; Art. VIII, Sec. 15; Art. XII, Secs. 12, 13; Art. XV, Secs. 2, 4, 17, 24, 25; Ordinance No. 3.—red App. 17-21.

Session Laws of Alaska 1959, Chap. 17, red App. 22-23; Chap. 95, red App. 26-27.

Proclamations of the President: Jan. 3, 1959, admitting Alaska, 24 Fed. Reg. 81, red App. 29-30.

Press Release, Secty. Interior Seaton, April 7, 1960, and proposed regulations to govern Indian Fishing in Alaska, April 9, 1960, 25 Fed. Reg. 3079, red App. 32-38.

Statement of Fish and Wildlife Service of all fish traps, Indian and non-Indian, operated in Alaska for last five years, dated April 13, 1960, red App. 39.

The following additional matters are quoted in our Appendix to this brief:

Sec. 1505 Judicial Code, 28 U. S. C. § 1505.

Delegation of authority for enforcement of regulations governing Indian fishing in Alaska, Fed. Reg. July 25, 1961, and August 5, 1961, 26 Fed. Reg. 6628, 7064.

Letter of November 3, 1961, Hildegard Thompson, Acting Asst. Commissioner, Bureau of Indian Affairs.

Statement of the Case

The appeal to the Supreme Court of Alaska has in no way changed the facts stated in the complaints and admitted in the motion to dismiss as they were reiterated in the brief filed in the original appeal on April 20, 1960, as follows:

Appellants, Village of Kake and Angoon Community Association, are each an Indian corporation chartered pursuant to the Indian Reorganization Act of 1934 [48 Stat. 984, 988, as amended 49 Stat. 1250, § 17; 25 U. S. C. § 477]; and each has as its membership an entire village of Thlinget Indians. The village of Kake is located at Kake, Alaska,[4] and that of Angoon is located at Angoon, Alaska.[5] S. R. 82-83, 102.

Each appellant operates fish traps, boats, canneries and related equipment which was purchased by the United States in trust for appellants as beneficial owners (S. R. 83, 102-103), although each appellant owes a sizeable debt to the United States arising out of the acquisition and operation of this equipment (S.R. 88, 108). The United States furnishes the funds for operating this equipment (S.R. 84, 103), the operation of which, at the present time and historically, is the only employment available to the members and constitutes the sole source of income for the calendar year for almost all of the members (S.R. 89, 108).

Operation of the traps is essential to the operation of the canneries; appellants do not have available to them an alternative method of maintaining their operations. Closing the canneries would wipe out the economic base of the members, leaving the villages with no means of self-support, the

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[4] Kake is located on the northwest side of Kupreanof Island approximately 100 miles southwest of Juneau.

[5] Angoon is located on the southwest side of Admiralty Island, approximately 60 miles southwest of Juneau.

resulting damage extending to the very fiber of their social, economic and cultural well being. S.R. 88-89; 108.

Although the regulations (24 F.R. 2053) of the Secretary of the Interior of March 7, 1959, prohibited fish traps generally, the prohibition was not applied to native fish traps and some traps of each of the appellants were designated for operation. S.R. 84-85, 104. The Secretary of the Interior based this distinction in treatment of Indian and non-Indian traps on the disclaimer of Indian fishing rights made by the State of Alaska, and on the long-standing supervisory control exercised by the United States for the protection of the Indians. S.R. 85, 104-105.[6]

Notwithstanding appellants were thus authorized to operate, appellee (Governor Egan) both personally and by his agents threatened appellants with seizure of their traps and criminal prosecution of the persons installing and maintaining them, and, on June 15, 1959, actually seized a trap which Kake had set out and arrested the President of Kake's Council and the foreman of the crew which set the trap. S.R. 86, 105-106.

The complaints charged, among other things, that sec. 4 of the Statehood Act and Art. XII, Sec. 12, of the Constitution of Alaska prevented the State from interfering with the control and management of Indian fishing rights held by the Indians or the United States as trustee on their behalf; that the regulations allowing appellants to operate constituted an exercise by the United States of its exclusive powers over the fishing rights of Indians; that the regulation of Indians was exclusively in the United States; and that the state statutes (Constitutional Ordinance No. 3 and Chap. 17, Sess. L. Alaska 1959) were repugnant to the statutes and Constitution of the United States and of Alaska.

[6] See letter to Alaska Area Director set out at length at S.R. 131-132. The disclaimer of Alaska cited by the Secretary of the Interior is Sec. 4 of the Statehood Act, quoted in our red Appendix p. 5.

S.R. 87-88; 106-107. A preliminary and a permanent injunction were prayed. S.R. 91-92; 110-111.

To these complaints appellee immediately moved to dismiss (S.R. 120, 122), asserting exclusive state jurisdiction over the lands and waters involved, that the state has authority to prohibit fish traps for commercial fishing; that the Constitution of Alaska has amended the White Act (of 1924), 48 U.S.C. § 221 et seq. (red App. 15-17); that the federal regulations (of March 7, 1959) are invalid; that the regulation permits a discrimination not permitted under the White Act and conflicts with the Constitution of Alaska, and that plaintiffs have no property right in a fish-trap location. The District Judge dismissed the complaints, relying upon the "equal footing" doctrine.

This Court, in its decision directing appellants to perfect their appeal to the Supreme Court of Alaska, indicated as its reasons for the direction, "While we have before us questions of federal law that are the concern of this Court, their consideration implicates antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State, upon which it would be patently desirable to have the enlightenment which the now fully formed Alaska Supreme Court presumably could furnish." 363 U.S. at p. 561. It sought enlightenment specifically upon "the status of these two Indian communities in relation to the authority of the Secretary of the Interior" and "justification of this legislation under the so-called police power." 363 U.S. at p. 562. It also noted that if 95 SLA 1959, Sec. 1, should be construed to exempt Indians from the prohibition against fish traps, "a constitutional question now appearing on the horizon might disappear." p. 562.

In attempting to supply this Court with the specific information requested in its opinion (363 U.S. at p. 561), the Supreme Court of Alaska had before it only the earlier rec-

ord as printed for this Court—substantially only the complaint and motion to dismiss which admitted the allegations of the complaint. Since apparently the court below felt it required additional facts, it might have remanded the case to the trial court for the taking of additional testimony. Instead, it chose to fill out the record largely by mere *ex cathedra* assertions, thus depriving appellants of any opportunity to cross-examine or offer evidence refuting the statements made. Much that was asserted is not only unsupported, but is contrary to fact; and if these matters were within the judicial knowledge of the court below, then they are within the judicial knowledge of this Court; and we will ask this Court to hold them correctly.[7]

The court below argued (1) that because the waiver of jurisdiction in the enabling Act was not a fulfillment of the waiver of jurisdiction offered in the Alaska Constitution, it was not "accepted" by Congress and so did not become the "solemn compact" referred to and even was of no force and effect as to fishing rights, leaving the State a clear field to regulate Indian fishing rights whatever their nature (Opinion 17a—20a, 25a); (2) that the section of the Alaska Omnibus Act clarifying the jurisdiction of the United States over such fishing rights is not binding upon the State of Alaska because it was not part of the compact (Opinion 20a); (3) that the Indians held no fishing rights to be protected (Opinion 21a-25a); (4) that the State in the proper exercise of its police power must have authority to regulate

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[7] Whatever is law or fact in a state court below is similarly law or fact here, and this Court takes judicial notice to the same extent as the court below—without which, of course, it could not truly review the court below. See *Hanley* v. *Donoghue*, 116 U.S. 1, 6-7. This Court reviews the record in state-court cases to the extent necessary to vindicate a claimed federal right. *Southern Pac. Co.* v. *Schuyler*, 227 U.S. 601, 611. "State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact." *Williams* v. *North Carolina*, 325 U.S. 226, 236.

native fishing (Opinion 25a-29a); (5) that Section 4 of the Statehood Act violates the equal-footing doctrine (Opinion 30a); (6) that appellants have no relationship with the federal government warranting the special protection of Section 4 of the Statehood Act (Opinion 34a-40a); (7) that the language in 95 SLA 1959 had the single purpose of lulling the Secretary of the Interior ("to preserve or restore administrative harmony at a critical period") into the feeling that there was no conflict between the State and the Territory in the interpretation of Section 4 of the Alaska Statehood Act for the purpose of obtaining the Secretary's certificate that the State was ready to undertake its own fish and wildlife regulation (Opinion 47a); and (8) that permitting the fish traps is a denial of "equal footing" on the ground of the new state's ownership of navigable waters and submerged lands (Opinion 48a-54a).

The Department of the Interior has continued to assert its jurisdiction over appellants' fishing rights. On June 2, 1960, 25 F.R. 4865, pursuant to notice of April 9, 1960, 25 F.R. 3079,[8] the Secretary of the Interior promulgated semi-permanent regulations as Part 88, 25 C.F.R. subchap. (H), implementing 25 U.S.C. §§ 2 and 9, 5 U.S.C. § 485 and Section 4 of the Statehood Act. The regulation specifically authorizes the use of fish traps by appellants. It further provides that: "The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations." (Section 88.8, red App. 38). As a further step in implementing its policy of permitting appellants to continue operation of fish traps, the Secretary of the Interior delegated his authority to enforce the regulations of the Depart-

[8] The notice is printed pages 34-38 of the red Appendix. The regulation as adopted and incorporated into 25 C. F. R. Part 88 is not substantially different from the regulation as proposed.

ment of the Interior governing the commercial Indian fishing in Alaska to the Director of the Bureau of Commercial Fisheries,[9] who, in turn, in line with his authority redelegated the duty to the Regional Director, Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.[10]

Summary of Argument

In this case this Court can no longer avoid the disagreeable duty of finding legislation unconstitutional—either an act of Congress or Alaska state legislation. Both Alaska and the United States claim jurisdiction—each to the exclusion of the other—to regulate the fishing of appellant Indians. The federal government claims that right by virtue of Sec. 4 of the Alaska Statehood Act, which reserves to the United States "absolute jurisdiction and control" of the fishing rights of Indians until Congress shall otherwise provide. Alaska asserts its own statutes regulating fishing, and says that the provisions of Sec. 4 of the Statehood Act are either invalid or ineffective for several reasons.

The court below holds Sec. 4 of the Statehood Act invalid because of the equal-footing doctrine—that is, Alaska must have the right to regulate its fish and game or the provision of Congress that it be admitted on an equal footing with other states is frustrated. The difficulty is that similar express reservations of federal authority and Indian right in connection with the admission acts of other states have been repeatedly upheld by this Court. The state also claims rights under its police power to regulate fishing by appellant Indians; but it is well established that where the state police power comes into conflict with powers exercised law-

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[9] Order of July 18, 1961 (26 F.R. 6628), Federal Register, July 25, 1961. App. *post* 33.

[10] Order of July 26, 1961 (26 F.R. 7064), Federal Register, August 5, 1961. App. *post* 34.

fully by the federal government, the state police power must give way. The court below holds that the Alaska Constitution "offered" to disclaim Indian fishing rights only as those rights were "defined" in the act of admission, and that the act of admission did not specifically define the rights, so that there was no literal acceptance of the state's offer. But if a formal contract be necessary in these circumstances, it was effected pursuant to Sec. 8(b) of the Statehood Act, which required ratification of Sec. 4 by the people of the state and without which the entire act would have fallen.

The court below holds Sec. 4 ineffective. But Sec. 4, in reserving jurisdiction over Indian fishing, is not meaningless; Congress did not adopt it as mere idle ceremony; appellant Indians were fishing there at the time, and Congress reserved to its own jurisdiction the regulation of that fishing. The court below says there are not now and never have been Indians in Alaska as that term is used in federal Indian law; but the allegations of the complaint, uncontested affidavits, public records and notorious historical and ethnological fact all show beyond question that appellants are Indians quite as much as are Indians elsewhere. The court below holds that appellants had no right or title in their fishing. But these Indians were fishing when the Statehood Act was passed and they had always fished, from time immemorial. The small remnant of their aboriginal fishing rights is nonetheless a *right* protected by federal law whether or not it is recognized by formal treaty or agreement with the particular tribe. These fishing rights have been recognized for many years by the Department of the Interior; and its efforts in that respect ultimately led to Sec. 4 of the Statehood Act now before the Court.

Accordingly, Sec. 4 of the Statehood Act validly reserves jurisdiction in the federal government, and the state's acts

conflicting with that jurisdiction must fall under the Supremacy Clause—although they would also fall under the contract-impairments clause, since the compact between the federal government and the people of the state pursuant to Secs. 4 and 8(b) of the Statehood Act actually is a contract protected against state impairment.

ARGUMENT

I. Section 4 of the Statehood Act Is Valid and Effective

A. Section 4 of the Statehood Act is Valid

1. Section 4 of the Statehood Act is Valid Notwithstanding the Equal-Footing Doctrine.—The court below holds (Opinion 49a, 53a) that to deny Alaska ownership of the soil beneath the navigable inland waters which are involved here would be violative of the equal-footing doctrine, as would be withholding sovereignty over the inland waters, citing *Pollard* v. *Hagan*, 3 How. 212, 228-229; *Shively* v. *Bowlby*, 152 U.S. 1, 26; and *United States* v. *Texas*, 339 U.S. 707, 716.

Pollard v. *Hagan* deals with the broad language of agreement under which the state was admitted. 3 How. at p. 223—

> "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, *except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States,* for the temporary purposes provided for in the deed of cession and the legislative Acts connected with it. *Nothing remained in the United States, according to the terms of the agreement, but the public lands.* And, if an express stipulation had been inserted in the agreement, granting the municipal

right of sovereignty and eminent domain in the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted." (Italics added.)

Yet here we have the express reservation of rights and jurisdiction in the United States where jurisdiction is independently sustained under the federal Constitution against the very contention of the *Pollard* case. *United States* v. *Sandoval*, 231 U.S. 28, 38 and cases cited. See also *Ex parte Webb*, 225 U.S. 663, 669-70. Similarly, *United States* v. *Holt State Bank*, 270 U.S. 49, cited by the court below, Opinion 48a, footnote 100, does not hold that the federal government *could* not have reserved the lake for the Indians, but only that it *did* not. To the contrary, it states that the federal government can create rights in tidelands and such rights are not cut off by statehood. pp. 54-5. *Shively* v. *Bowlby* and *United States* v. *Texas* merely typify the rule of the *Pollard* case that if the United States still owns them, the state upon admission takes title to the tidelands.

In addition to tidelands, the doctrine of the tidelands cases covers beds of lakes and navigable waterways. Yet, the reservation of Indian fishing rights and jurisdiction has been honored as to each. See *Seufert Bros.* v. *United States*, 249 U.S. 194, 198-9; *Tulee* v. *Washington*, 315 U.S. 681, 684-5. Thus, the tidelands cases do not support to any extent the unconstitutionality of Section 4 of the Statehood Act.

The court below (Opinion 30a-31a) places heavy reliance upon *Ward* v. *Race Horse*, 163 U.S. 504. That case was aberrant; and this Court has flatly held to the contrary in many cases since. That case held that Wyoming could punish an Indian for violating a state game statute in killing

seven elk off his reservation in reliance on a claimed treaty right to hunt on "unoccupied lands of the United States." Prior to *Ward* v. *Race Horse*, the reservation of lands to which Indians had had original title had been respected (*Gaines* v. *Nicholson*, 9 How. 356, 365); and following *Ward* v. *Race Horse*, the Court immediately returned to that earlier doctrine in *United States* v. *Winans*, 198 U.S. 371, 380-81, which held that although the white man felt he could make better use of the fishing right than the Indian,[11] the United States could create rights when it held the territory which would be binding upon the state after admission and that the rights conferred upon the Indians are not subordinate to the powers acquired by the state upon its admission into the Union upon an equal footing. This view has been consistently followed by this Court since, including further cases of state interference with Indian fishing. *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198-9; *Tulee* v. *Washington*, 315 U.S. 681, 684-5. Exclusions of state jurisdiction over Indians by admission acts have uniformly been sustained as well in other situations against contentions based on the equal-footing doctrine. *Dick* v. *United States*, 208 U.S. 340, 353; *Ex parte Webb*, 225 U.S. 663, 682, 690; *United States* v. *Sandoval*, 231 U.S. 28, 38, 45-46, 49.[12] For the equal footing doctrine is of no greater dignity than the Congressional power to regulate commerce with the Indian tribes. *Dick* v. *United States*, 208 U.S. at p. 353. In 1954 this Court declined an opportunity to review an opinion of the Supreme Court of Idaho commenting instructively on

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[11] "It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common." p. 382.

[12] Counsel who had convinced the Court in *Ward* v. *Race Horse* by this time had ascended this Bench and wrote the opinion in the *Sandoval* case, leaving no doubt as to the power of the United States or the fact that such an exclusion in an admission act (New Mexico) did not offend equality with the other states.

the deviation in *Ward* v. *Race Horse*. *State* v. *Arthur*, cert. den. No. 552, O.T. 1953, 347 U.S. 937, denying review of 74 Ida. 251, 261 P. 2d 135, 138-139.

At the same time, *Ward* v. *Race Horse* is distinguishable on its face. This Court specifically noted (163 U.S. at p. 506) that Wyoming was admitted on an equal footing with the original states in all respects whatever "but in this act there was no exception, as there had been in the territorial act, in favor of the Indians." The lack of reservation of rights of and jurisdiction over Indians was emphasized and reemphasized by the Court. p. 515. The distinction from the present case, with its express reservation of rights and jurisdiction, is plain.

2. **The State Police Power Does Not Render Section 4 of the Statehood Act Invalid.**—The court below based the control of fishing here exercised by Alaska on the police power. Opinion 25a-28a. The court rejected the contention that Section 4 of the Statehood Act could override the state exercise of police power—which means that the "absolute jurisdiction and control of the United States" over Indian fishing rights which was retained by Section 4 of the Statehood Act yields to the state police power, if the state court is correct.

Of course, the rule is precisely the reverse. While the state may have a police power, it may not exercise it if it collides with the federal Constitution or an act of Congress. "But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause." *Morris* v. *Jones*, 329 U.S. 545, 553. The rule was long ago stated succinctly in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25:

> "A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General

Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

3. **Section 4 of the Statehood Act Is Not Invalid as an Inadequate Acceptance of a Conditional Waiver in the State Constitution.**—The Supreme Court of Alaska refers in terms of contract law to the compact between the state and the United States pursuant to Section 12 of Article XII of the Alaska Constitution and Section 4 of the Statehood Act, calling the constitutional disclaimer an "offer" and Section 4 of the Statehood Act a "response." Opinion 16a-17a. Since the state "offered" to disclaim property, including fishing rights, held by or for any Indian, Eskimo, or Aleut, or community thereof, "as that right or title is defined in the act of admission", it holds that Section 4 did not quite come up to the offer because it failed to define the right or title in the act of admission. Opinion 18a.

But if Section 4 of the Statehood Act in order to have vitality can be considered only as a contract with Alaska, that contract was plainly reached whether or not Section 4 accepted the state's "offer." For Section 8(b) of the Statehood Act specifically provided for a vote of the people of Alaska on the proposition whether the provisions of the Statehood Act "reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people." Red App. 8-9. If not "*fully consented to*", the Statehood Act was ineffective; Alaska could not be admitted. If consented to, "the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly." Red App. 9. As the proclamation admitting the state shows (red App. 29), the people of Alaska by their

vote agreed to this exclusive federal jurisdiction; and if there were any infirmity as between Section 12 of Article XII of the Alaska Constitution and Section 4 of the Statehood Act, the compact was reached with Alaska through its people and their vote to accept Section 4.

B. Section 4 of the Statehood Act is Effective

1. **Section 4 is Not Meaningless.**—Section 4 says there "shall be and remain under the absolute jurisdiction and control of the United States" any "lands or other property (including fishing rights)" which may be held by or in trust for any Indians. The court below in effect holds this meaningless since "no fishing rights were held by or for natives at the time." Opinion 25a.

The phrase "including fishing rights" received special consideration when the Statehood Act was under consideration. See H.Rept. No. 624, 85th Cong., 1st Sess., p. 31; S.Rept. No. 1163, 85th Cong., 1st Sess., at p. 47. Its inclusion had been questioned by the Department of Justice, so it cannot be said that this phrase was included by inadvertence. It was again considered in connection with the Alaska Omnibus Act. In an analogous situation of statutory construction, this Court said (*Mid-Northern Oil Co.* v. *Walker*, 268 U.S. 45, 48):

> "It fairly cannot be supposed that Congress would indulge in the altogether idle ceremony of enacting a law to save rights which, being in no way challenged or affected, stood in no need of being saved."

Neither can it be supposed that Congress would indulge in the altogether idle ceremony of enacting a law to save rights which did not exist. These Indians were fishing there at the time; both Congress and the incipient state knew it. The rights under which they were fishing were, then, plainly reserved to exclusive federal jurisdiction.

2. Appellants are "Indians" Subject to Regulation by Congress.—A main ploy of the court below to escape the reach of federal jurisdiction over appellants was an attempt to make it appear that there are no Indians in Alaska so that appellants are in no respect Indians. Thus, the court says (Opinion 34a) that "There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law."

This flies squarely in the face of allegations of the complaints: "That said village is located in Kake, Alaska; that said corporation is a membership corporation whose membership is that of an entire village, presently numbering 400 people; that the members thereof are of the Thlingit Indian Tribe; . . ." S.R. 83. (Same allegation as to Angoon, S.R. 102; affidavits supporting S.R. 93, 116.) With this also is to be compared the language of the federal constitution and bylaws of the Organized Village of Kake handed up to the Court at the previous argument: "We, the Kake Indians of Alaska, an Indian band or tribe . . ." approved by the Secretary of the Interior November 17, 1947; similarly, the corporate charter of Kake: "Whereas, the Kake Indians of Alaska, an Indian band or tribe, seek to organize . . . [under the Indian Reorganization Act of 1934]." The Angoon charter refers to Indians having a common bond of residence in the neighborhood of Angoon.

The status of these Indians as tribal Indians is notorious ethnological fact anyway: *Tlingit & Haida Indians of Alaska* v. *United States*, — C. Cls. —, 177 F. Supp. 452 (Oct. 7, 1959). In Finding 25, p. 48 of the pamphlet opinion, the Court of Claims holds: "The following are the names of the modern communities where the Indians of the Tlingit tribes live: . . . 6. *Hutsnuwu* tribe: Angoon (located at the same place as the original village); . . . 8. *Kake* tribe: Kake (located at the same place as the original village) . . .

Angoon, Kake, . . . are the native villages." See the map which accompanies the findings, Pl. Ex. 169, at p. 455 of 177 F.Supp. Cf. Compilation of Material Relating to the Indians of the United States and the Territory of Alaska pursuant to H.Res. 66, 81st Cong., 2d Sess., June 13, 1950, Serial No. 30, pp. 20, 22—*e.g.*, p. 22, "*Kake* a Tlingit Indian Tribe located on Kupreanof Island in southern Alaska." To the same effect, H.Rept. No. 2503, 82d Cong., 2d Sess., pp. 621-2. See *Swanton, The Indian Tribes of North America,* Bur. Am. Ethnology Bull. 145 (1952), pp. 540-3. We may ask, as to this assertion of the court that there are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law whether, indeed, the United States has deluded itself in establishing at Juneau one of its ten major area offices of the Bureau of Indian affairs. See Congressional Directory, 87th Cong., 1st Sess. (April, 1961), p. 479.

The Supreme Court of Alaska also asserts, for instance, that "Neither the residents of Kake and Angoon nor their Tlingit ancestors have ever been treated as wards of the United States." (Opinion 36a). And, ". . . Congress has not historically exercised a fostering care over the communities of Kake and Angoon, nor over their Tlingit ancestors, nor in fact over any of the Indians of Alaska." (Opinion 38a). Now, it is true that these Indians were impoverished by the white man who had found them "industrious and prosperous, and the accumulation of surplus wealth was a basic feature of their economy", *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F.Supp. 452, 456. But it is flatly not true that the United States regards these people in either fact or law as differing from other Indians in their special relationship to the federal government. Thus, the complaints allege that plaintiffs have been organized and chartered by the federal government, as we showed

just above; that the United States Department of Interior has authorized the institution of this suit and the retention of counsel (whose selection and compensation are subject to the approval of the Secretary of the Interior). S.R. 82-83, 102. The Secretary of the Interior has referred in this case to "the long-standing supervisory control exercised by the United States for the protection of the Indians, . . ." S.R. 85, 105, 132.

Title to appellants' canneries and even the Corps of Engineers' permits authorizing them to maintain fish traps is in the name of the United States as trustee for appellants. S.R. 83, 102, 133-37. It is unchallenged that ". . . the earnings of the Kake Cannery are handled under the supervision of the United States" (S.R. 94), and that ". . . the total indebtedness of Kake to the United States is presently $781,872.33 [in 1959]." S.R. 99. We note also "That the present value of said properties is $377,218.45" (S.R. 99)[13] — which would seem to be fairly substantial "fostering care" which the court below says has not historically been exercised.

While denying United States guardianship for the sake of trying to close up appellants' fisheries, Alaska is all too willing to accept funds under the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, 25 U.S.C. § 452, for the education of children at Kake and Angoon by reason of their ward status in relation to the federal government. See letter of Hildegard Thompson, November 3, 1961, attached as an Appendix to this brief, *post* p. 35.[14]

The 1936 extension of the Indian Reorganization Act of 1934 to Alaska was not the federal government's first rec-

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[13] For similar facts relative to Angoon see S. R. 113-117.

[14] Before the territory took over the schools at Kake and Angoon with the aid of federal funds available to local school districts for the education of Indians, the schools were owned and operated by the Alaska Native Service. See letter, *supra*, Appendix *post* 35.

ognition that it owed a special duty to the Tlingits as its wards. The 1867 Treaty by which the United States acquired Alaska from the Russians made provision that the uncivilized natives should be treated by the United States as it treated its own aboriginees. (Art. III, red App. 1-2).

The Court of Claims in *Tlingit and Haida,* (177 F.Supp. 452 at 462) found that "The fact that the United States never attempted to make treaties with these Indians is not significant since shortly after the acquisition of Alaska from Russia in 1867, Congress enacted the Act of March 3, 1871, 16 Stat. 544, 566, prohibiting any further dealings with Indians by treaty." The handbook on *Federal Indian Law,* p. 936, offers an additional explanation: "This was primarily because the reasons which were responsible for treaty-making by the Federal Government with the American Indians were not present in Alaska, where there was plenty of land and little danger of serious hostilities."

In 1873, Sections 20 and 21 of the Trade and Intercourse Act, prohibiting liquor traffic in Indian country and with the Indians, were extended to include Alaska.[15]

Beginning in 1905 and continuing to the present day, Congress has appropriated funds earmarked for education of the natives of Alaska (Act of January 27, 1905, 33 Stat. 616, 619, Sec. 7), and such funds are still used by the Department of the Interior for the education of the Indians of Kake and Angoon. The 1905 Act made these Indians eligible to attend Indian Boarding Schools in the states.

The hunting and (fishing rights) of the Alaskan natives were generally recognized by Congress throughout the years. The Act of June 7, 1902, 32 Stat. 327, as amended by

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[15] Act of June 30, 1834, 4 Stat. 729, 732-33; Act of March 3, 1873, 17 Stat. 510, 530. Failure of the government to enforce the prohibition (*Fed. Indian Law,* p. 936) was not a denial of the need of these Indians for the protection contemplated, but merely another instance of the government's neglect of these distant wards.

the Act of May 11, 1908, 35 Stat. 102, made exceptions to the hunting laws on behalf of the natives and others for subsistence needs.[16] This right to take animals, birds or game fish out of season when other food was not available was continued for the benefit of the natives, prospectors and travelers by Act of January 13, 1925, 43 Stat. 739, 744, § 10, 48 U.S.C. § 198, as amended February 14, 1931, 46 Stat. 1111, and Act of June 25, 1938, 52 Stat. 1169, 48 U.S.C. § 205. The Act of January 13, 1925, 43 Stat. 739, § 11, provided for exemption for natives or half-breeds who had not severed tribal relations from the resident hunting and trapping license. That explorers and sometimes settlers living among the natives were accorded these same privileges did not detract from the fact that the privileges were extended to the natives as natives and not as citizens of the territory. *United States* v. *Winans,* 198 U.S. 371, 381.

The government did not affirmatively create reservations at Kake and Angoon, though through the protections from interference it accorded by statute and regulation, it may be said negatively to have done so. The policy of Congress in a series of acts beginning in 1884 of protecting the lands of the natives in actual occupation had the effect of "reserving" to them their villages—at least their main villages as of 1884—which appellants still occupy.[17] The 1936 Act extending the benefits of the Wheeler-Howard Act to Alaskan

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[16] "Nothing in this Act shall * * * prevent the killing of any game animal or bird for food or clothing by native Indians or by Eskimo or by miners, explorers, or travelers on a journey when in need of food * * *." Apparently the natives were not bound by the condition "when in need of food." Act of June 7, 1902, 32 Stat. 327, § 1. This was amended by Act of May 11, 1908, 35 Stat. 102, § 1, to read that "Nothing in this Act shall * * * prevent the killing of any game animal or bird for food or clothing at any time by natives, or by miners or explorers, when in need of food; * * *."

[17] Act of May 17, 1884 (23 Stat. 24, 26, Sec. 8 (red App. 2-3)). Act of March 3, 1891, 26 Stat. 1095, 1100, Sec. 14. *Cf.* Act of May 14, 1898, 30 Stat. 409, 413, Sec. 10.

natives also provided a method for the Department of the Interior to enlarge these reservations.[18] The one reservation in southeastern Alaska established under the 1935 Act was struck down on the grounds that the Secretary of the Interior had not conformed factually or procedurally with the terms of the law.[19] The court did, however, assert that the Haida Indians involved were ward Indians, saying (p. 699): "... equality only awaits the emancipation of the Indian from wardship restriction." This failure and the extreme opposition that developed to the creation of any reservations in southeastern Alaska[20] put an end to any further efforts along that line.

Citizenship of appellants is irrelevant to their status as Indians subject to federal regulation. As the Court stated in *Winton* v. *Amos*, 255 U.S. 373, 391-92, "It is thoroughly established that Congress had plenary authority over the Indians and all their tribal relations and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and

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[18] Act of May 1, 1936, 49 Stat. 1250: "Sec. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use or occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 17 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said territory. . . ."

[19] *United States v. Libby, McNeil & Libby*, 107 F.Supp. 697 (Alaska, 1952).

[20] In *United States* v. *Libby, McNeil & Libby, supra*, p. 699, the court said: "Viewing this controversy in historical perspective it is no exaggeration to say that nothing since the purchase of Alaska has engendered so much ill feeling and resentment as the Department's reservation policy and its encouragement of aboriginal claims." For several years thereafter, bills were introduced in Congress forbidding the creation of reservations in Alaska. See *e.g.* S.J. Res. 162, 80th Cong.; H.J. Res. 269, 80th Cong.; S. 363, 81st Cong.

it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it." *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 311-16; *Hallowell* v. *United States*, 221 U.S. 317, 324; *Creek County* v. *Seber*, 318 U.S. 705, 718.

3. **Appellants Have "Rights" Referred to in Section 4 of the Statehood Act.**—The Supreme Court of Alaska (Opintion 24a) stated that "Our search leads us to the belief that no act of Congress had established any 'right or title' in fishing rights which were 'held' by or for natives at the time the compact was made. Whatever hunting or fishing privileges Congress has extended to natives in the past have been equally applicable to the white residents . . . [Opinion 25a]. We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States . . . This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were 'held' by or for natives at the time."

In the foregoing statement, the court apparently feels that rights in the natives have to be affirmatively created by act of Congress. This ignores that these Indians have rights which they have exercised since before the white man came to Alaska. The small remnant of these rights they seek here to protect. The fact that they have always been fishermen is recognized not merely by appellee but is shown by the recent case of *Tlingit and Haida Indians of Alaska* v. *United States*, — C. Cls. —, 177 F. Supp. 452, 456-457 (1959).

The rights are legal rights, not merely moral ones. From the outset of our national dealings with the Indians, the natives of this country have been "admitted to be the rightful occupants of the soil, with a **legal** as well as just claim to retain possession of it." *Johnson* v. *M'Intosh*,

8 Wheat. 543, 574 (1823). "Whether . . . a reservation . . . or unceded Indian country, . . . the Indians' **right** of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota* v. *Hitchcock,* 185 U.S. 373, 388-9 (1902). The Court has referred to the Indians' ". . . unquestioned **right** to the lands they occupy, until . . . extinguished by a voluntary cession to our government; . . ." *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17 (1831). "Indians have **rights** of occupancy . . . as sacred as the fee-simple, absolute title of the whites; . . ." (*id.,* p. 48). They have ". . . a **right** to all the lands within [their territorial] boundaries, which is not only acknowledged, but guaranteed by the United States" *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832). Indians hold lands " . . . **owning** them by a perpetual **right** of possession in the tribe . . . [which, though fee was in the crown] could not be taken without their consent . . . their **right** of occupancy is considered as sacred as the fee-simple of the whites." *Mitchel* v. *United States,* 9 Pet. 711, 745-746 (1835). The Court has spoken of their ". . . unquestionable **right** to the lands they occupy, until . . . extinguished by a voluntary cession. . . . This perpetual **right** of occupancy, with the correlative obligation of the government to enforce it. . . ." *Leavenworth Railroad* v. *United States,* 92 U.S. 733, 742 (1875). It has spoken of the ". . . **right** of Indians to their occupancy [which] is as sacred as that of the United States to the fee, . . ." *United States* v. *Cook,* 19 Wall. 591, 593 (1873). It has said that "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian **right** of occupancy . . . " *United States as Guardian, etc.* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 345 (1941), and *Cramer* v. *United States,* 261 U.S. 219, 227 (1923). "It was the

usual policy not to coerce the surrender of lands without consent and without compensation. . . . Something more than sovereign grace prompted the obvious regard given to original Indian title." *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 48 (1946).

The legal position of a tribe or a clan of Indians cannot well be understood without the realization that it constitutes a government—not merely aboriginally, but now—not with only property rights, but with governmental functions recognized by the Indian Reorganization Act (under which these appellants are organized, S.R. 82-83, 102) itself. But the fact that these are political entities, owing, when the white man first came to their country, no allegiance to the United States, has been the Achilles heel of the Indian tribes of this country.

Though their legal rights are plain beyond all cavil, they are governments; the dealings of the federal government with their legal rights is in the political field. No more than could the Russian Government on a trespass by the United States could the Indian tribes come to this country's courts for redress. The Indians could appeal only to the political branch, only to the political conscience of our country. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-566 (1903).

And when that conscience has heeded the natives' appeal, as has so frequently been the case with the legislative branch of our government (as distinguished from the executive, whose representatives so often have sided with the pioneer in his conflicts with the aborigine), the courts are freed from the political restraint and bound to protect the native's existing rights. While the student may express wonder that the courts call a violation of "unrecognized" title (as distinguished from land held pursuant to treaty or statute) a mere trespass as distinguished from a taking under the 5th Amendment entitling the aboriginal owner to

just compensation,[21] and while the student may wonder why a treaty right may, under § 1505 of the Judicial Code (Appendix, *post*), collect just compensation immediately upon a taking, while the Indian-title right must await still further political permission from Congress,[22] the fact that in any

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[21] For a *tortious* taking of private property for public use there is no right to just compensation under the Fifth Amendment. *United States* v. *Goltra*, 312 U.S. 203, 208 (1941). But a treaty title of Indians, despite the political bar to suit, gives the right (enforceable when Congress gives permission to sue) to just compensation under the Fifth Amendment. *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); 299 U.S. 476, 495-496 (1937). On the other hand, if the rights involved are aboriginal rights not politically recognized by the United States through treaty or statute—that is, which have not become a contract right of, or a guaranty by the United States to, the Indians, then a taking of title by the United States, and apparently with or without the authorization of Congress, is tortious and does not require just compensation under the Fifth Amendment, *i.e.*, results in a judgment for only the value at time of taking, without any damages for delay in making payment. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49. Note that the *Alcea* case cites the *Goltra* case (tortious taking) as authority for this distinction.

[22] A taking of recognized Indian title—the contract right referred to in note 21, just above—is one "arising under or growing out of any treaty, agreement or act of Congress." *United States* v. *Creek Nation*, 295 U.S. 103, 108 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937); *Seminole Nation* v. *United States*, 102 C. Cls. 565 (1944). Therefore it comes under the express language of § 1505 of the Judicial Code (Appendix, *post*); the taking gives a right of immediate action for just compensation. Not so with Indian title which has not been recognized; while it affords the same basis for recovery if Congress waives the political bar and permits suit (first *Alcea—United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40 (1946); cf. second *Alcea*, above, n. 21) this Court squarely held that a tribe cannot recover for its taking under the language of § 1505 of the Judicial Code. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955). While the latter decision is easy enough to understand as relating to a taking not "arising under the Constitution, laws or treaties of the United States," since no treaty guaranteed the right that was taken, still the Court's opinion is not instructive as to why the right is not a claim "which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group," also embraced by that section; for if, as the cases indicate, the bar to suit is the political bar, then an Indian tribe just like any other property-owning corporation might have been thought entitled to sue for its property once that bar has been removed.

event there is a right furnishing adequate basis for judicial recognition is left undoubted by the cases.[23] And here that political conscience has heeded the appeal. In Section 4 of the Statehood Act Congress expressly required a disclaimer by Alaska not only of all right and title to property (including fishing rights) held by or for any Indians, but also an agreement that there is retained by the United States absolute jurisdiction and control of that property (including fishing rights). No matter how or when the United States might take the remaining fishing rights of appellants, or how or when or to what extent it might make compensation for their taking, the fact remains that the fisheries is a property right of appellants, and until and unless interfered with by Congress, Alaska is powerless to terminate it.

These fishing rights have been recognized for many years by the Department of the Interior.—In 1942, the Solicitor of the Department of the Interior handed down an opinion on the question "Whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians under departmental regulations, and whether such rights require or justify the closing down of certain trap sites or the allocation of trap sites to Indian groups or other remedial action by the Secretary of the Interior." 57 I.D. 461. The question was answered in the affirmative, the Solicitor holding that the Alaska Indians had aboriginal possessory rights within the meaning of *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339. He found that whatever possessory rights the Alaskan Indians enjoyed in the waters of submerged lands were not impaired under Russian rule and were not divested by the United States, p. 464. He noted "in the first place, it must be recognized that the mere fact that the common

[23] First and second *Alcea*, discussed in notes 21 and 22 just above.

law does not recognize several rights of fishery in ocean waters or rights in land below the high water mark does not mean that such rights were abolished by the extension of American sovereignty over the waters in question. It is well settled that Indian legal relations, established by tribal laws or customs antedating American sovereignty are unaffected by the common law." Citing *Ex parte Tiger*, 2 Ind. T. 41, 47 S.W. 304 (1898), and *Delaware Indians* v. *Cherokee Nation*, 38 C. Cls. 234 (1903), modified 193 U.S. 127, as well as *Damon* v. *Hawaii*, 194 U.S. 154, and *Carter* v. *Hawaii*, 200 U.S. 255.

In discussing the effect of the White Act limitation against exclusive rights of fishery the Solicitor noted that it "clearly refers to grants under the statute and not to rights existing long prior to the statute." p. 468.[24]

Until the decision of the Court of Claims in *Tlingit & Haida Indians* v. *United States*, 177 F. Supp. 452, the issue whether the natives of Alaska retained any aboriginal rights remained in doubt.[25]

Notwithstanding the doubt, the Department of the Interior continued to assert and try to protect the fishing rights of the natives. See *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, *United States* v. *Libby, McNeill & Libby*, 107 F. Supp. 697 (D. Alaska, 1952). It sponsored legislation which would have caused the commercial canneries to give up trap sites within the aboriginal areas of the various clans to those clans or villages. S. 1446, H.R. 3859, 80th

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[24] *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, which has been cited to the contrary, when carefully read stands only for the proposition that White Act sanctions could not be used to protect such pre-existing rights. As a matter of fact, *Hynes* v. *Grimes* held that the Secretary of the Interior could reserve waters to the Indians irrespective of the pre-existing rights, but that the reservation could not be protected by White Act sanctions.

[25] *Miller* v. *United States*, 159 F. 2d 997, 1002. The court in *Tlingit and Haida* found the rights exist. p. 464.

Cong. Approaching the problem differently, the Department, in March, 1948, aided Angoon in the acquisition of the cannery to which the trap sites in its aboriginal area were connected (S.R. 102, 103) and in 1950 did the same for Kake (S.R. 83.)

That policy was continued with the insertion into the Statehood Act, Sec. 4, of the parenthetical phrase "fishing rights". And Congress was assured by the Secretary of the Interior that "the Bureau of Indian Affairs of the Department of the Interior will continue its trusteeship for these [Indians, Eskimos and Aleuts] natives after statehood." Hearings on S.49, 85th Cong., Committee on Interior and Insular Affairs of the Senate, p. 101.

II. Alaska Law Regulating Appellants' Fishing Must Yield to Section 4 of the Statehood Act

Federal regulations say that appellants may fish some of their trapsites. Alaska law says they may not fish any of them. One or the other must yield.

Section 4 of the Statehood Act says that fishing rights of Indians shall be "under the absolute jurisdiction and control of the United States until disposed of under its authority". Unless this Court shall hold that provision unconstitutional, then, under the Supremacy Clause, the state law must yield. Cf. *Irvine* v. *Marshall,* 20 How. 558, 562-63 (1857). And it has been repeatedly held that the reservation to Indians of rights such as these is perfectly valid and within the power of Congress. We reviewed the cases in discussing the equal-footing doctrine; see *United States* v. *Winans,* 198 U.S. 371, 380-81 (1905); *Seufert Bros. Co.* v. *United States,* 249 U.S. 194, 198-99 (1919); *Tulee* v. *Washington,* 315 U.S. 681, 684-85 (1942); *Dick* v. *United States,* 208 U.S. 340, 358 (1908); *Ex parte Webb,*

225 U.S. 663, 682, 690 (1912); *United States* v. *Sandoval*, 231 U.S. 28, 38, 45-6, 49.

The Supremacy Clause aside, the hostile state legislation would fall as an attempt to impair the obligations of contract—the contract being the compact entered into between the United States in Section 4 of the Statehood Act and the people of Alaska through their express vote pursuant to Section 8(b) of the Statehood Act. *Green* v. *Biddell*, 8 Wheat. 1, 92-93 (1823); *The Kansas Indians* 5 Wall. 737, 751, *et seq.* (1866), as reviewed in *Coyle* v. *Smith*, 221 U.S. 559 at pp. 578-79.

Conclusion

The judgment should be reversed and, pursuant to Section 14 of the Statehood Act (red App., p. 12) and Article XV, Section 17 of the Alaska Constitution (red. App., p. 20), the case should be remanded to the Supreme Court of Alaska.

Respectfully submitted,

JOHN W. CRAGUN,
Counsel for Appellants in No. 3.

FRANCES L. HORN,
WILKINSON, CRAGUN & BARKER,
Of Counsel.

APPENDIX

Sec. 1505 of the Judicial Code (28 U.S.C. § 1505) was derived from § 24 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 1055), according the first general authority to Indian tribes to sue the United States on such of their claims as might arise after the date of that act. In its present form it was adopted with the Judicial Code of 1949, and reads:

§ 1505. Indian claims

The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

26 F. Reg. 6628, July 25, 1961

Fish and Wildlife Service

DIRECTOR, BUREAU OF COMMERCIAL FISHERIES

Commercial Indian Fishing in Alaska; Notice of Delegation of Authority To Enforce Regulations

SECTION 1. *Delegation.* The Director of the Bureau of Commercial Fisheries is authorized, subject to the provisions of section 2 of this order, to exercise the authority delegated by the Secretary of the Interior in Secretary's Order No. 2857 to enforce the regulations of the Department of the Interior governing the commercial Indian fishing in Alaska set forth in 25 CFR Part 88, in those areas in the State of Alaska in which he is requested to do so by the Commissioner of Indian Affairs.

SEC. 2. *Redelegation.* The authority delegated by section 1 of this Order may be redelegated in writing to the Regional Director, Region 5 of the Bureau of Commercial Fisheries. The redelegation of this authority shall be published in the FEDERAL REGISTER.

Dated at Washington, D.C., July 18, 1961.

CLARENCE F. PAUTZKE,
Commissioner of Fish and Wildlife.

26 F. Reg. 7064, August 5, 1961

Fish and Wildlife Service

Commercial Indian Fishing in Alaska

Notice of Delegation of Authority to Region 5 Director to Enforce Regulations

The regulations issued herein are based on authority of the Director, Bureau of Commercial Fisheries, to issue such regulations. The requirements herein set forth apply as a portion of the directives system of the Bureau. Such material follows the format of the Bureau's Manual and is to be included therein.

Series 5000—Resource Development

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5491. *Commercial Indian Fishing in Alaska.*

549.1. *Delegation of Authority.* The authority included in the Federal Register of July 25, 1961 to enforce regulations for commercial Indian fishing in Alaska, is hereby delegated to the Regional Director, Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.

Dated at Washington, D.C., July 26, 1961.

Donald L. McKernan,
Director,
Bureau of Commercial Fisheries.

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Washington 25, D.C.

November 3, 1961.

Wilkinson, Cragun, and Barker,
1616 H Street, N.W.,
Washington, D. C.

GENTLEMEN:

We are pleased to provide you the information requested by telephone November 1, 1961, concerning Johnson-O'Malley Act assistance to the public school system at Kake and Angoon, Alaska.

Both schools were constructed for education of native children, Kake in 1891 and Angoon in 1920. Both were operated by the Federal Government until their transfer to State jurisdiction. According to our records the facilities at Kake were transferred under a Use Permit No. 41-14 effective July 1, 1947. Johnson-O'Malley Act assistance was furnished the district beginning in 1960 to enable the school district to develop high school grades. The funds are provided under the State Johnson-O'Malley Act contract.

The independent school district at Angoon, Alaska, took over the operation of the Federal school at the beginning of the school term in 1954. Johnson-O'Malley Act assistance has been furnished the district each year since that time in the absence of a local tax base to support local share of financing the public education program involving the native children. The contract was made directly with the school district until 1958 when this district was included in the Johnson-O'Malley Act plan developed with the Territory. This plan was approved later by State officials following Alaskan statehood.

If we can be of further assistance, please advise.

Sincerely yours,

HILDEGARD THOMPSON,
Acting Assistant Commissioner.

(9806-1)